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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. _____.

71 - 697

CORNWELL QUALITY TOOLS CO.,
Cross-Petitioner,

vs.

C.T.S. COMPANY, INC.,
Respondent.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit.

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C.T.S. COMPANY, INC.,
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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Ninth Circuit.

Cornwell Quality Tools Company ("Cornwell") cross-petitions conditionally for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on June 25, 1971, and as to which an order of August 31, 1971, was entered denying a petition for rehearing of the Respondent C.T.S. Company, Inc. ("CTS"). The Respondent CTS has filed a petition for a writ of certiorari in No. 71-608.

OPINIONS BELOW.

The opinion of the Court of Appeals is officially reported at 446 F.2d 825 (9th Cir. 1971); a copy is attached as Appendix A, *infra*. The order denying the Respondent's petition for rehearing is not officially reported and a copy is attached as Appendix B, *infra*. The District Court did not write a formal opinion in the case and the Memorandum which is prepared titled "Court's Memorandum on Motions for Directed Verdicts," is attached hereto as Appendix C, *infra*.

JURISDICTION.

The judgment of the Court of Appeals was made on June 24, 1971, and entered on June 25, 1971. A petition for rehearing filed by Respondent was denied on August 31, 1971. This Court has jurisdiction under 28 U.S.C. 1254(1). The jurisdiction of the trial court was based on 28 U.S.C. 1337 and 15 U.S.C. 15. The jurisdiction of the Court of Appeals was based on 28 U.S.C. 1291 and Rule 4(a) F.R.A.P.

QUESTIONS PRESENTED.

1. Was the evidence introduced by Cornwell showing an intent by its then distributor, CTS, to switch all Cornwell dealers to a competing line of tools which it had secretly obtained in order to drive Cornwell from the relevant market sufficient to state a jury case for the specific intent required in a case of attempted monopolization under Section 2 of the Sherman Act?

2. Was the evidence introduced by Cornwell showing a conspiracy between CTS and another manufacturer, a competitor of Cornwell, to create a system of protected territories and to capture the business of Cornwell dealers while CTS purported to act as Cornwell's distributor promoting sales of Cornwell tools to such dealers sufficient to state a jury case for conspiracy to monopolize and attempted monopolization under Section 2 of the Sherman Act?

STATUTES INVOLVED.

Section 2 of the Sherman Act, 15 U.S.C. 2, provides in pertinent part as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a misdemeanor. . . ."

Section 4 of the Clayton Act, 15 U.S.C. 15, provides as follows:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE.

The Cross-Petitioner Cornwell filed a suit on an open account against CTS, the Respondent, for sales of tools made to it while CTS had been a distributor of its line of branded tools. CTS had formerly been the sole distributor for Cornwell's line of tools in California and Nevada. CTS responded with a counterclaim for antitrust damages. Cornwell, with leave of court, amended its own claim to include charges of violation by CTS of Section 2 of the Sherman Act.

At trial, Cornwell introduced evidence to show that CTS had conspired with one of Cornwell's competitors, Mac Tools Company, to deny Cornwell a market for its tools in California and Nevada. CTS and Mac Tools Company were shown to have entered into an agreement whereby CTS would become the exclusive distributor of Mac tools in California, Nevada and parts of Arizona. It was shown that CTS and Mac agreed that CTS would be protected against competition from other sellers of Mac tools at wholesale and that CTS would designate protected territories for dealers (Plaintiff's Exhibit 38, pages 3-9; Plaintiff's Exhibit 19, page 81, Defendant's Exhibit CY, pages 144, 162). CTS intended to obtain all of the business of dealers then selling Mac tools within the protected area as well as sales to dealers then selling Cornwell tools. Tools sold by Cornwell and Mac, as in the case of one other manufacturer, were sold to the public by dealers usually driving trucks displaying the brand of tools being promoted for sale. CTS actually contacted dealers and persuaded them to switch their loyalty at a time while Cornwell believed that CTS was serving as its sole distributor for its product. CTS handled a number of other lines of tools but it chose to sell the Cornwell line and later the Mac line only to dealers who displayed the particular brand on their trucks.

The trial court excluded most of the testimony offered by Cornwell. In the offer of proof made by Cornwell out of the hearing of the jury it received entire transcripts of testimony given by witnesses evidencing the matters alleged by Cornwell, which are summarized above (Defendant's Exhibit CY, Plaintiff's Exhibit 38, Plaintiff's Exhibit 19). It also excluded most of the testimony of a former distributor of Mac tools, one H. C. McIntosh, who had been terminated by that company pursuant to the arrangement between it and CTS (R.T. 2185). The evidence offered showed that dealers who had been formerly selling Cornwell tools were in fact switched to the Mac line and that former distributors of Mac tools were terminated and CTS given the exclusive franchise for sale in California, Nevada, and parts of Arizona (R.T. 2186). The offered evidence also showed that CTS and Mac Tools Company agreed on the territories to be assigned to dealers of Mac tools within CTS's protected territory.

Cornwell was told of the switch in product line by dealers only after the fact and before it had been given an opportunity to inform former Cornwell dealers that its own tools would be available to them. Evidence offered would have shown that Cornwell was substantially damaged by the delay, expense, and effort necessary to reestablish its line within the relevant marketing area (R.T. 2590).

The Court of Appeals held that the trial court had properly directed a verdict against Cornwell and against CTS on their respective Sherman Act Section 2 charges. It held that Cornwell had not shown the specific intent required under the Act to make out a charge of attempted monopoly. It did not expressly rule with respect to the charge of conspiracy to monopolize but affirmed the directed verdict which had been entered by the trial court on this issue.

The Court of Appeals thus did not rule upon the propriety of evidence offered by Cornwell as it was introduced but instead viewed the evidence both introduced and offered as a whole. As had the trial court, it rejected wholesale the testimony elicited from officers of CTS and Mac Tools Company as to their agreement before termination of Cornwell as CTS's supplier and the testimony of H. C. McIntosh, the former distributor for Mac Tools Company who had been terminated pursuant to the agreement with CTS. The Court stated in its opinion that the evidence tended to show that there had been an agreement by CTS and Mac Tools Company to create a system of protected territories (Appendix A, pages 12a-13a). It concluded that the evidence was not sufficient, however, because Cornwell had not proven or offered to prove that the practice had resulted in or was likely to result in the exclusion of any competitors from the relevant market. It did not deal with the issue of whether or not the termination of the Mac distributors by Mac and the temporary ouster of Cornwell from the market satisfied the requirement of exclusion from the relevant market within the meaning of that concept.

ARGUMENT.

Cornwell makes its application for issuance of a writ conditional upon the granting of the writ of certiorari of the Respondent CTS. Cornwell does not otherwise seek review because of its doubt as to the importance of this case as a whole as expressed in its brief in opposition to Respondent's petition for certiorari.

If the Court determines that Respondent's petition in No. 71-608 should be granted, we believe it should review the entire case and correct the error of the court below in directing a verdict against the antitrust claim of Cornwell. As the Court of Appeals says in its opinion, the claims of the parties as to the attempted monopolization charges are quite similar and undoubtedly suffer from the same flaws if they are in fact insufficient to make out a jury case (Appendix A, page 12a).

This petition also raises a question concerning the adequacy of offers of proof and evidence actually introduced as to the conspiracy between CTS and Mac Tools Company by which it was substantially damaged. The opinion of the Court of Appeals did not discuss the requirements of a conspiracy to monopolize under Section 2 of the Sherman Act. By declining to discuss the issue, the Court impliedly declined to follow the holding of *United States v. Consolidated Laundry Corporation*, 291 F.2d 563 (3rd Cir. 1961) and the dictum in *United States v. Yellow Cab*, 332 U.S. 218, 225-226 (1947). See also Hibner, "Attempt to Monopolize—A Concept in Search of Analysis," 34 A.B.A. Antitrust Law Journal 165.

CONCLUSION.

If the Court grants a writ of certiorari to the Respondent CTS in No. 71-608, it should grant a writ of certiorari pursuant to this cross-petition in order to review the entire case.

Respectfully submitted,

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APPENDIX

APPENDIX A.

OPINION AND JUDGMENT OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

CORNWELL QUALITY TOOLS Co., *Plaintiff-Appellant*, v. C.T.S. COMPANY, INC., *Defendant-Appellee*. No. 24,914.

CORNWELL QUALITY TOOLS Co., *Plaintiff-Appellee*, *v.* C.T.S. COMPANY, INC., *Defendant-Appellant*. No. 24,969.

(June 24, 1971.)

Appeal From the United States District Court for the Central District Court of California.

Before: MERRILL, ELY, and HUFSTEDLER, *Circuit Judges*.

HUFSTEDLER, *Circuit Judge*:

Cornwell Quality Tools Co. ("Cornwell") and C.T.S. Company, Inc. ("C.T.S.") filed cross-appeals from the adverse portions of the district court's judgment entered after each party had moved successfully against the other for directed verdicts.

The case breaks into four parts: (1) Cornwell's claim against CTS to recover the purchase price of merchandise it sold to CTS, its former distributor, and CTS's set-off and counterclaims against Cornwell charging breach of a claimed oral contract to repurchase the inventory upon termination of CTS's distributorship; (2) CTS's counterclaims against Cornwell for treble damages based on alleged violations of the federal antitrust laws; (3) Cornwell's counterclaim against CTS charging a violation of the federal antitrust laws; and (4) Cornwell's contention that the district court erred in taxing costs.

Cornwell, an Ohio manufacturer of mechanics' hand tools, entered an agreement with CTS in 1956 whereby CTS became Cornwell's sole distributor in California and

Nevada. CTS entered contracts with dealers to whom were assigned specified territories. The dealers, sometimes called "wagon men," made sales from trucks to the ultimate consumers, usually mechanics. That mode of distribution was used by three manufacturers operating in California and Nevada: Cornwell, Snap-On Tools Corporation of Kenosha, Wisconsin ("Snap-On"), and Mac Tools Corporation of Sabina, Ohio ("Mac").

In 1964, differences arose between CTS and Cornwell, the responsibility for which was hotly contested. According to Cornwell, the relationship deteriorated because CTS made a distribution deal with its competitor Mac, intending to obtain all of Mac's and Cornwell's dealers and to restrict competition in Nevada and California to itself and Snap-On. CTS entered a course of conduct whereby Cornwell would lose its distribution system in CTS's territory unless Cornwell acquiesced in CTS's selling both Cornwell's tools and Mac's. Cornwell refused to yield and, instead, set up its own warehouse in California and began selling directly to dealers. CTS's version is very different. CTS claims that Cornwell had decided in 1963 to eliminate distributors and to undertake direct sales to dealers. Cornwell pursued its plan to squeeze out CTS. To protect itself from Cornwell's machinations, CTS made the agreement with Mac to have at least one line to sell.

In July 1964, CTS took on the Mac line. Cornwell immediately terminated CTS's distributorship, and shortly thereafter Cornwell opened its branch in California. After CTS switched allegiance and before Cornwell filed suit, both parties vigorously sought to secure the dealers and customers of the other. The antitrust claims stem from the contentions of each that the other's efforts exceeded the bounds of lawful competition.

Cornwell started the litigation by filing a complaint to recover $12,110.72, the unpaid balance of the account for merchandise sold to CTS. The action expanded with the cross-filing of counterclaims. After more than four years of discovery and pretrial proceedings, the cause came to trial before a jury.

CTS stipulated to the amount of Cornwell's claim for the price of merchandise, but it contended that it was entitled to 22,361.29 damages for Cornwell's breach of an alleged oral contract to repurchase the inventory in the event of termination of the distributorship. Cornwell admitted that it did not repurchase CTS's inventory when the distributorship was terminated, but it contended that there had been no agreement to repurchase it.

The contract issues were tried first, excluding the damages issue. Evidence adduced on both sides indicated that the parties had entered an oral agreement that Cornwell would repurchase the inventory upon termination, but there were conflicting versions of the terms of the agreement. Cornwell's motion for a directed verdict was based on the grounds that no oral agreement was enforceable because: (1) California's Commercial Code § 2201 requires that a contract for the sale of goods for the price of $500 or more cannot be enforced unless there is a writing complying with the statute, and (2) California's Commercial Code § 2202 excluded proof of the oral agreement because it contradicted the terms of written purchase orders for the tools. The district court did not direct the verdict on either of those grounds. The court decided to take the contract issues from the jury when, shortly before the jury was to be instructed, the court learned that one of the jurors was sick, and Cornwell refused to stipulate to have the questions resolved by eleven jurors. The court explained that it was directing the verdict because it

appeared to be the most expeditious ways to bring the entire case before the Court of Appeals.

Cornwell recognizes that the direction of the verdict on the contract issues cannot be upheld unless we can say, as a matter of law, that recovery on the claimed oral contract was foreclosed by the statute of frauds or by the parol evidence rule. The statements of those rules in the Commercial Code are irrelevant because the transactions occurred before the Commercial Code became effective, and the Code does not have retrospective application. (Cal. Com. Code § 10101.)

The parol evidence rule did not foreclose proof of the oral agreement because there was no evidence that the written purchase orders were intended to be final embodiments of the parties' agreements. The rule is inapplicable to unintegrated writings. (*Royal Industries v. St. Regis Paper Co.* (9th Cir. 1969) 420 F.2d 449; *Masterson v. Sine* (1968) 68 Cal. 2d 222.)

The statute of frauds did not, as a matter of law, bar enforcement of the oral agreement. The evidence is susceptible to the interpretation that part performance of the oral agreement took the agreement out of the statute. (Cal. Civ. Code § 1724; *Monarco v. LoGreco* (1950) 35 Cal. 2d 62.)

After the contract issues had been presented, CTS commenced trial of its antitrust counterclaims in accordance with the order of proof adopted in pretrial proceedings. After a week of trial on CTS's counterclaims, the district court halted further proof, and, over the objections of both parties, ordered CTS to suspend its case and directed Cornwell to begin its case-in-chief on its antitrust claims against CTS. Following the conclusion of Cornwell's testimony, the court directed the

parties to finish their respective cases on offers of proof. Both parties made written and oral offers of proof. CTS never rested its antitrust case, and rebuttal was not made by either party. At the conclusion of the respective offers of proof, following argument, the court directed verdicts against both parties.

The offers of proof are lengthy. They are a curious compound of documents, depositions, narrations, legal argument, and conclusions. We do not view these offers hypertechnically, however, because we recognize that much of their disorderliness is attributable to the unusual procedural directions that caused them to be produced.

We turn to CTS's antitrust claims against Cornwell.

CTS made five separable antitrust claims against Cornwell, alleging that Cornwell had violated: (1) section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a) by offering discounts in California and Nevada in an attempt to drive CTS out of business; (2) section 2(c) of the Robinson-Patman Act (15 U.S.C. § 13(c)) by paying unearned commissions to dealers in California and Nevada; (3) section 3 of the Clayton Act (15 U.S.C. § 14) and section 1 of the Sherman Act (15 U.S.C. § 1) by forcing its dealers to enter into exclusive dealing contracts; (4) section 1 of the Sherman Act by terminating CTS for refusing to enter into an illegal exclusive dealing arrangement with it; (5) section 2 of the Sherman Act (15 U.S.C. § 2) by attempting to monopolize the sale of tools to mechanics in the California and Nevada area.

CTS's threshold problem in proving a prima facie case for any of its antitrust claims was proof to a well-defined relevant market upon which the challenged anti-competitive actions would have had a substantial impact.

Cornwell argues vigorously that CTS's evidence and its offers of proof were inadequate to sustain CTS's prima facie burden on this issue. But it argues almost as vigorously the opposite side of the same issue when it seeks to overturn the directed verdict against it on its own antitrust claim against CTS. We conclude that there was enough evidence presented and promised by both sides on the issue to foreclose the direction of the verdict on the relevant market score.

There was evidence adduced and offered that professional quality hand tools and related equipment sold by mobile dealers (wagon men) to ultimate consumers constitute a separate product market or line of commerce under the Sherman, Clayton, and Robinson-Patman Acts, that such hand tools are so distinctive that they cannot be compared with other hand tools, and that there are only three manufacturers which market professional quality hand tools in California and Nevada through mobile dealers, namely, Snap-On, Mac, and Cornwell. CTS was ready to prove that these three companies did not face substantial competition from other tool manufacturers in this market for three reasons: First, the tools of these companies are of markedly better quality, particularly in terms of durability, than similar tools manufactured by other companies. Hence, for the professional mechanic, they are not interchangeable with other tools. Second, only these three companies make "specialty tools" for the repair of late model automobiles. Thirty to forty percent of the tools they manufacture and sell are specialty tools needed by professional mechanics and available nowhere else. Third, these three companies sell exclusively through roving dealers, 85 percent of whom are franchised by one of the three companies. Because the marketing mode is convenient and because the dealers

often possess expertise upon which consumers tend to rely, professional mechanics seldom purchase tools from any source other than Mac, Snap-On, or Cornwell dealers in California and Nevada.

Upon CTS's full production of the evidence, it may well be, as Cornwell sometimes argues, that dealers with fixed locations actively compete with Mac, Snap-On, and Cornwell for the professional tool trade, that the mode of retailing is not a meaningful basis for distinguishing those three vendors from other tool distributors, and that the share of the properly defined relevant market held by Cornwell, Mac, and Snap-On is so insubstantial as to be beneath the notice of the federal antitrust laws. But we cannot say from the evidence that CTS produced, together with the evidence promised, that a jury could not have found that the market picture was as CTS painted it, or that the jury would have had to find that Cornwell's view of the market was right. The record before us does not permit us to sustain the removal of the relevant market issue from the jury.

In discussing the antitrust claims of CTS and of Cornwell, we view the evidence adduced and promised with the same intendments favorable to the proponent against whom the verdict was directed as those mentioned in connection with the relevant market issue.

CTS claimed that Cornwell violated section 2(a) of the Robinson-Patman Act by engaging in discriminatory pricing. Under section 2(a) of the Act, sellers cannot sell like goods to different buyers at different prices if the pricing tends to injure competition in either the buyers' or the sellers' market, unless the price differentials are justified by factors recognized in the Act.

CTS sought to prove that Cornwell sold its tools in California and Nevada for less than it did in other parts

of the country. The district court foreclosed discovery and attempted proof of that claim, ruling that price differentials outside of California and Nevada were irrelevant. The ruling was erroneous (*e.g., F.T.C. v. Anheuser-Busch, Inc.* (1960) 363 U.S. 536). Upon remand, the district court will allow CTS an opportunity to establish price differentials between Cornwell's buyers outside of Nevada and California and those within that area.

It is unnecessary to detail all evidence introduced or proffered in respect to CTS's section 2(a) claim. A brief sketch will suffice. After termination of CTS's distributorship, Cornwell sold tools to some of its California and Nevada dealers at substantially greater discounts than it gave to others in the same states. That evidence was prima facie sufficient to establish the price discrimination element of its section 2(a) claim. (*F.T.C. v. Anheuser-Busch, supra.*) To meet the anti-competitive-effect requirement, CTS offered to prove that Cornwell sold tools to selected California and Nevada dealers below cost. If CTS makes good its offer, predatory intent can be inferred. From proof of predatory intent, the jury could infer anticompetitive effect. (*Utah Pie v. Continental Baking Co.* (1967) 386 U.S. 685.) It follows that CTS's evidence on its section 2(a) claim was enough to avoid a directed verdict.

Section 2(c) of the Robinson-Patman Act makes it unlawful for any person to pay brokerage commissions on the sale of goods to the purchaser, or to anyone acting as the agent of, or on behalf of the purchaser, unless the commissions were earned for services rendered in effecting the sale. CTS offered to prove that Cornwell paid commissions to certain dealers on the sale of products to neighboring dealers, although the former had nothing to do with the sale. CTS says the scheme was to reward dealers for not competing with each

other. There is no violation of section 2(c) unless the person receiving the unearned commissions was under the control of purchasers or acting on behalf of purchasers. CTS offered no proof that the dealers who received commissions fell in either category. The district court properly granted a directed verdict upon CTS's section 2(c) claim.[1]

CTS next claimed that Cornwell's exclusive dealing contracts with its dealers violated section 3 of the Clayton Act. The existence of the exclusive dealing contracts was not in dispute.[2] The section 3 issue is whether or not CTS offered enough proof prima facie to establish the requisite anticompetitive impact on the relevant market. CTS offered to prove that 10 to 15 percent of the California and Nevada dealers had entered into such contracts with Cornwell.[3] Although the figure cannot compel a finding of substantiality and, upon full proof, the impact may be insignificant, we cannot say that the evidence was so flimsy as to permit withdrawal of the issue from the jury. In *Standard Oil of California v. United States* (1949) 337 U.S. 293, the Supreme Court held that the locking up of 6.7 percent of the retail gasoline market permitted an inference of substantial impact. It may be, as Cornwell argues, that the differences between the tool

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[1] We do not decide whether or not the challenged conduct was, or could have been, a violation of the Sherman Act.

[2] The district court excluded the offered contracts on the ground that they were immaterial. Cornwell tacitly recognizes that the exclusion was erroneous.

[3] Cornwell objected to the introduction of contracts entered into subsequent to January 18, 1965, the date on which CTS filed its first counter-claim. Regardless of the merits of that contention, which are discussed *infra*, it does not appear from this record that so many of the contracts complained of date from the period subsequent to January 18 as to destroy CTS's argument on anticompetitive effect.

and gasoline markets are such that a 10 percent share of the former is of much less significance than a 6.7 percent share of the latter, but that is an issue that cannot be decided as a matter of law on this record.

CTS also claimed that Cornwell terminated its distributorship because CTS refused to enter a nationwide exclusive dealing arrangement with Cornwell whereby distributors were required to deal solely with Cornwell and were required to impose similar restrictions upon their dealers. CTS did not offer a portrait of the national market for mechanics' tools, and the jury could not have found the nationwide aspects of the arrangements to be anticompetitive.[4] However, CTS did offer to prove that had it entered the exclusive dealing arrangement with Cornwell, enough dealers in California and Nevada would have been locked up to have permitted a jury to infer that the arrangement might have had substantial impact on the relevant market. That evidence was enough to prevent taking the issue of the legality of the rejected contract from the jury. Prima facie proof that the rejected contract was violative of the antitrust laws coupled with similar proof that Cornwell terminated the distributorship because CTS refused to enter the illegal contract would make out its prima facie claim that Cornwell violated section 1 of the Sherman Act. (*Osborn v. Sinclair Refining Co.* (4th Cir. 1960) 286 F.2d 832, *cert. denied* (1960) 366 U.S. 963). CTS offered no direct evidence to prove that Cornwell's motivation in terminating the distributorship was CTS's refusal to enter the exclusive deal-

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[4] CTS complains that it did not do so because the court's limitations on discovery prevented its access to information about the national aspects of Cornwell's exclusive dealing arrangements. But there is no suggestion that the court's ruling prevented CTS from gathering information on the competitive situation in the national market.

ing arrangement, but it did offer to prove that Cornwell had unsuccessfully exerted pressure on CTS to sign the contract only a month before termination. A jury could have inferred a cause-and-effect relationship between these events. We are mindful of the Supreme Court's admonition that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles." (*Poller v. Columbia Broadcasting System, Inc.* (1962) 368 U.S. 464, 473.)

CTS's final antitrust claim is that Cornwell attempted to gain monopolistic control over the sale of tools in California and Nevada in violation of section 2 of the Sherman Act. CTS offered to prove that Cornwell tried to implement its plan to monopolize by driving CTS out of business. To convert Cornwell's conduct from vigorous competition into a separate Sherman Act offense, CTS had to prove two additional elements: (1) Cornwell had the specific intent to monopolize, and (2) it had sufficient market power to come dangerously close to success. (*Swift & Co. v. United States* (1905) 196 U.S. 375.)

We do not reach the second element because we have concluded that the evidence produced, together with the conclusory statements of the offer of proof, were inadequate to present an issue for the jury in respect of the first element even after we have indulged the full spectrum of intendments in CTS's favor.

With respect to the antitrust claims that are being remanded for trial, we discuss briefly the dispute concerning the relevance of evidence concerning events that occurred after January 18, 1965, the date upon which CTS filed its first counterclaim. Cornwell has consistently objected to the introduction of evidence as to events that occurred after that date; CTS has argued that it may present evidence of events occurring right up to trial.

Neither party is entirely correct. CTS cannot present evidence of new antitrust violations occurring after the filing of its counterclaim in an effort to have these violations serve as the basis of recovery, nor can it introduce evidence as to damages suffered after the date of filing due to activities constituting part of a continuing violation of the antitrust laws that occur subsequent to the filing date. (*Flintkote Co. v. Lysfjord* (1957) 246 F.2d 368, 394-97.) The proper cut-off date, however, is March 26, 1965, the date on which CTS filed its final counterclaims in response to Cornwell's amended complaint. Moreover, if it proves liability, CTS has the right to recover compensation for all past and future damages suffered as a result of Cornwell's alleged violations. Evidence as to actual damages suffered as a result of actions ocurring prior to the filing is admissible, even if the damages themselves arose after the counterclaims were filed. Further, evidence of any activity of Cornwell's that may reflect upon its market position or the intentions of its management at the time of the alleged violations is admissible regardless of when it occurred.

We now take up Cornwell's antitrust claims against CTS. Cornwell contends that CTS attempted to monopolize the mechanics' tool market in violation of section 2 of the Sherman Act and that CTS conspired with Mac to achieve that design, likewise in violation of section 2. Cornwell's claims are a mirror image of the CTS claim last discussed, and it suffers similar flaws. The only evidence directed to the specific intent issue is proof that CTS intended to carry both Mac and Cornwell tools. We do not think that evidence under all of the circumstances was enough to carry Cornwell's section 2 claim to the jury. Cornwell makes a great deal of evidence from depositions that tends to indicate that CTS and Mac had conspired

to set up exclusive territories for the Mac dealers, a per se violation of section 1 of the Sherman Act. (*United States v. Arnold Schwin & Co.* (1967) 388 U.S. 365.) However, since Cornwell never offered to prove that this practice resulted in, or was likely to result in, the exclusion of any competitors from the relevant market, CTS's intent to engage in this practice cannot serve as the specific intent to monopolize required for a section 2 violation.

The remaining point is Cornwell's complaint that the district court erred in taxing and apportioning costs. Cornwell requested no relief from the order in the district court. The district court has broad discretion in apportioning and taxing costs where, as here, neither party completely prevailed. No abuse of that discretion has been shown in this case.

The judgment is reversed, and the cause is remanded for further proceedings consistent with the views herein expressed. Each party shall bear its own costs on appeal.

APPENDIX B.

ORDER OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE CORNWELL QUALITY TOOLS COMPANY, A corporation, *Appellee*, v. C.T.S. COMPANY, INC., A corporation, *Appellant*. No. 24914.

(Filed Aug. 31, 1971.)

Before: MERRILL, ELY, and HUFSTEDLER, *Circuit Judges*.

The court on its own motion strikes footnote one (p. 5 of the slip opinion) in its entirety and accordingly renumbers the remaining footnotes.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

APPENDIX C.

MEMORANDUM OF DISTRICT COURT ON MOTIONS FOR DIRECTED VERDICTS.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA.

THE CORNWELL QUALITY TOOLS CO., a corporation, *Plaintiff*, vs. C.T.S. COMPANY, INC., a corporation, *Defendant*. No. 64-1456-HW.

(Filed June 13, 1969.)

Three manufacturers of mechanics' hand tools—Snap-On Tool Co. of Kenosha, Wisconsin, Mac Tools, Inc. and Mac Allied Tools Company of Sabina and Tallmadge, Ohio, and The Cornwell Quality Tools Co. of Mogadore, Ohio—sell their merchandise in the States of California and Nevada under a distributor-dealer program. Mac designated its distributors "District Managers." For convenience, Mac's "District Managers" will hereinafter be referred to as distributors.

A manufacturer would contract with a distributor to represent it in the two States; and the distributor entered into contract with salesmen, called dealers, (commonly known as wagon men *) to sell the merchandise door-to-door in an allotted territory. Distributors sold the merchandise to the dealers who would place it in wagons or trucks and then call upon prospective purchasers, usually service stations, garages, and small manufacturing plants.

The distributors paid the manufacturers for the goods purchased, the dealers reimbursing the distributors for

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* Salesmen, dealers, and wagon men are terms used interchangeably.

any goods purchased by them from the distributors. In many instances the dealer or wagon man was not able to finance a truck or a "wagon" and, in addition, purchase an inventory of hand tools to stock the vehicle; many dealers, as a consequence, needed financial assistance to engage in the business of selling hand tools.

In 1947 The Cornwell Quality Tools Co. (plaintiff in this action, hereinafter described as Cornwell) and C.T.S. Company, Inc. (defendant and counterclaimant, hereinafter designated as C.T.S.) entered into an oral agreement whereby C.T.S. became the sole distributor for Cornwell in California and Nevada. C.T.S. in turn, entered into contracts with approximately thirty to thirty-five dealers who were assigned specific territories within the two States and who sold to the trade from wagons in their designated territories. Over the years such dealers became known as Cornwell dealers.

Although dealers were referred to as "Cornwell dealers," "Snap-On dealers," or "Mac dealers," such appellations were untrue, as the dealers were independent businessmen who sold Snap-On, Mac, or Cornwell tools along with products of other manufacturers; but the bulk of their stock was one of the above-named brands.

Many C.T.S. dealers needed financial assistance to go into the business as wagon men; they borrowed from the distributor (C.T.S.), agreeing to pay principal and interest in monthly installments on promissory notes which they signed. C.T.S. then endorsed the notes to Cornwell, becoming responsible for the monthly payments to Cornwell as they came due. Each month C.T.S. would send Cornwell a check to cover the amount due on the promissory notes and would collect the payments due from the dealers on their respective notes.

There was very active competition within California and Nevada between Snap-on, Mac and Cornwell. Snap-On was the largest of the three manufacturers selling goods in California and Nevada by wagon men and did as much business as Mac and Cornwell combined. In 1964 there were approximately 150 to 200 dealers (wagon men) selling Snap-On, Mac, and Cornwell products in California and Nevada, of which number C.T.S. (the Cornwell tools distributor) had 30 to 35.

In 1964 Cornwell and C.T.S. became dissatisfied with their arrangement. Cornwell felt C.T.S. was not "pushing" Cornwell tools sufficiently, and C.T.S. resented any interference by Cornwell with its mode of operation in California and Nevada. On July 29, 1964 their agreement, under which they had operated for seventeen years, terminated.

Prior to July 29, 1964 C.T.S. had entered into negotiations with Mac Tools, Inc. and Mac Allied Tools Company (herein referred to as Mac) to represent them in California and Nevada; shortly after July 29, 1964 C.T.S. became distributor for the Mac line of hand tools in the two States and notified its dealers that C.T.S. was no longer representing Cornwell in California and Nevada, announcing that it had taken on the Mac line of hand tools.

C.T.S. induced its former Cornwell dealers to become Mac dealers; C.T.S. promised these Cornwell dealers that if they would handle the Mac line of products, C.T.S. would buy back from them all Cornwell tools which they then had on hand and, in addition, if the dealer was obligated upon any note held by Cornwell, C.T.S. (as payee-endorser of the note) would refinance such obligation or would arrange for the refinancing thereof through local banks. As a result of these proffered inducements by

C.T.S. the majority of former Cornwell dealers ceased to handle the Cornwell line and thereafter sold the Mac line, becoming known as Mac dealers.

Pursuant to its arrangement with Mac, C.T.S. took over the Mac dealers in California and Nevada and, retaining those Cornwell dealers which it had prior to July 29, 1964, had a larger number of dealers in California and Nevada than before July 29, 1964.

At the time of termination of the Cornwell-C.T.S. distributorship agreement in July, 1964, Cornwell was left without dealers in California and Nevada through whom to sell its merchandise. Consequently, Cornwell wrote to dealers (including those who had been handling Cornwell products) stating that C.T.S. no longer represented Cornwell in California and Nevada and suggesting that if dealers wished to sell Cornwell tools, arrangements would be made to supply them merchandise.

In July, 1964, upon termination of the longstanding relationship between C.T.S. and Cornwell, C.T.S. failed to pay to Cornwell amounts due on the respective promissory notes; and in its letter to former Cornwell dealers Cornwell called attention to the default in payment, reminding the dealer that under the terms of his note the entire amount was then due and payable. And on July 29, 1964 C.T.S. owed Cornwell for merchandise which it had purchased on the open book account existing between them. Cornwell made demand upon C.T.S. for payment of the balance due and, when C.T.S. failed and refused to pay, filed the within action to recover from C.T.S., alleging that the amount then due was $14,711.39.

C.T.S. filed its answer to amended complaint and counterclaims on March 26, 1965, demanding trial by jury. In this pleading C.T.S. alleged that after the oral agreement terminated (page 2, lines 12-14) Cornwell

> "* * * would accept the return of all merchandise sold to the defendant* *which the defendant had not then resold* and would repay to the defendant the purchase price thereof. * * *." *Emphasis supplied.*

On the subject of the merchandise to be returned upon cessation of the Cornwell-C.T.S. relationship, one witness at trial testified that the agreement was to take back tools "in the warehouse." Another witness testified that the agreement was to take back "tools in inventory." It was not until trial that C.T.S. contended the oral agreement to accept the return of merchandise included tools which C.T.S. had sold to dealers and *repurchased* from them.

In its effort to convert Cornwell dealers to Mac dealers, C.T.S. agreed to repurchase from them all Cornwell tools then in the dealers' possession. After such repurchase C.T.S. placed the Cornwell tools in the C.T.S. warehouse. C.T.S. contended that Cornwell's refusal to take back tools, including those repurchased from dealers by C.T.S. damaged C.T.S. to such an extent that it did not own anything on the open book account but, rather, that C.T.S. had been damaged by such refusal in an amount much greater than the balance alleged to be due on the open book account.

In its Answer to plaintiff's Amended Complaint C.T.S. alleged counterclaims, asserting at page 11 that Cornwell had been unlawfully attempting to monopolize

> "* * * the aforesaid interstate trade and commerce in the production, distribution and sale of tools, in violation of Section 2 of the Sherman Act (14 U.S.C. 2). * * *."

And C.T.S. further asserted (page 13) that Cornwell:

> "* * * has been continuously engaged in an unlawful combination and conspiracy and entered into unlawful contracts to unreasonably restrain interstate

trade and commerce in the manufacture, distribution and sale of tools throughout the United States, all in violation of Section 1 of the Sherman Act (15 U.S.C. 1) * * *."

In its third counterclaim C.T.S. alleged (page 15) that Cornwell has, since December, 1964,

"* * * engaged in an unlawful combination and conspiracy and entered into unlawful contracts to unreasonably restrain interstate trade and commerce in the manufacture, distribution and sale of tools in the state of California all in violation of Section 1 of the Sherman Act (15 U.S.C. 1). * * *."

The Fourth Counterclaim charged (page 16) that Cornwell

"* * * has violated and is now violating Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) by, in the course of commerce, discriminating directly or indirectly, in prices charged dealers for its tools of like grade and quality * * *."

In its Fifth Counterclaim C.T.S. asserted that (page 17) Cornwell

"has violated and is now violating Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act (14 U.S.C. 13(c)), by, in the course of commerce, paying or granting commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof, * * *."

The Sixth Counterclaim contended (page 18) that Cornwell

"violated and is now violating Section 3 of the Clayton Act (15 U.S.C. 14) by, in the course of commerce, making sales and contracting to sell tools, which tools are used, consumed and resold within California and

Nevada on condition, agreement or understanding that the purchasers thereof shall not deal in the tools manufactured and/or distributed by competitors of Cornwell. * * *."

When the Answer to Amended Complaint and Counter-Claims was served and filed and Cornwell was apprised of the fact that C.T.S. claimed antitrust violations, Cornwell filed its "Reply to Counterclaim" in which it alleged not only that C.T.S. owed Cornwell for goods, wares and merchandise sold and delivered but also that C.T.S. had unlawfully

"conspired and attempted to monopolize for itself the distribution and sale of hand tools in the States of California and Nevada and attempted to foreclose plaintiff from making sales or gaining access to established dealers of such tools in such states. * * *."

And plaintiff alleged that the actions and conduct of C.T.S. constituted violation of Section 2 of the Sherman Antitrust Act (15 U.S.C. § 2).

During pretrial the court ruled that the following format would be pursued in presenting the issues at trial:

PHASE 1—OPEN BOOK ACCOUNT

Cornwell would first establish its claim of the balance due on open book account.

PHASE 2—TOOLS TO BE RETURNED

C.T.S. would present the issue of the alleged agreement for return of tools.

PHASE 3—DEFENDANT'S ANTITRUST ASSERTIONS

C.T.S. allegations of antitrust violations by Cornwell, third in order of presentation.

PHASE 4—PLAINTIFF'S CLAIM OF ANTI-TRUST VIOLATIONS BY C.T.S.

Cornwell would present its asserted case of antitrust violation by C.T.S.

Open Book Account

During trial C.T.S. admitted it owed Cornwell a balance of $12,110.72 on open book account, subject to offset of damages allegedly sustained because of Cornwell's failure to take back tools.

Tools to Be Returned

As hereinbefore mentioned, C.T.S. alleged that a part of the oral agreement between C.T.S. and Cornwell was that upon termination of their relationship Cornwell was to accept back tools sold to the defendant (C.T.S.) "which the defendant had not then resold" and would repay to the defendant the purchase price thereof.

[sic] as to just which "returned tools" were included in the oral agreement to take back merchandise. From the evidence adduced at trial the court is of the opinion that there was some discussion between the parties on the subject of the return of tools when their relationship was initiated; but evidently they did not deem the return tool phase of their oral contract of such importance that it should be reduced to writing. If the parties did intend that on termination of their manufacturer-distributor relationship tools were to be returned and taken back, such contract of return should have been definite and certain. Testimony at trial failed to clarify the issue.

When the oral agreement ended in July, 1964 C.T.S. did not take inventory of the Cornwell tools in its possession in its warehouse or on its shelves. Annual inventory had been taken in January, 1964, and in December, 1964 another annual inventory was taken. C.T.S. contend that by using the January inventory, adding to that the goods purchased to July 29, 1964, and subtracting from that total the inventory of December, 1964 (taken five months after termination of the agreement between

the parties), the inventory of Cornwell tools as of July 29, 1964 could be ascertained.

All evidence on the subject of returned tools was presented, with the exception of damages, which question was reserved until determination of liability.

Defendant's Antitrust Assertions

Having presented evidence on the subject of returned tools (except damages), C.T.S. then presented that phase of its pleadings in which it alleged Cornwell had violated various antitrust laws.

Before proceeding with a discussion of what has been established in this case, it might be desirable to set forth what has not been claimed or established by C.T.S.

> 1. C.T.S. does not claim there has been price-fixing among the manufacturers, nor among the distributors, nor between manufacturers and distributors. In fact, there is no evidence of price-fixing whatsoever.

Distributors sold to dealers according to a list price, subject to a discount; and the dealers were to sell the merchandise according to the list price. There is no evidence that any manufacturer attempted to maintain the price of tools it manufactured.

> 2. There is no evidence of a division of territory among the manufacturers nor among distributors.

In representing Cornwell as distributor, C.T.S. established the policy of assigning dealers to designated territories but now objects to Cornwell doing the same thing after termination of the Cornwell-C.T.S. agreement.

> 3. There is no evidence in this case of any tie-in agreement between any of the parties; that is, that merchandise was sold only with the understanding that other merchandise would have to be purchased.

Although in its answer to the amended complaint C.T.S. alleged conspiracy between Cornwell and others and monopoly by Cornwell, at trial C.T.S. abandoned its theory of conspiracy and monopoly and predicated its claim upon an alleged attempt to monopolize. The assertions of C.T.S. that Cornwell violated the antitrust laws are listed by C.T.S. as follows:

A. Termination of C.T.S. distributorship by Cornwell.

B. Cornwell's refusal to accept return of tools.

C. Establishment by Cornwell of a California warehouse to sell its tools direct to dealers (wagon men).

D. Solicitation of dealers to handle Cornwell tools and inducement to become or remain Cornwell dealers.

E. Solicitation of C.T.S. employees to become Cornwell employees.

F. Cornwell's alleged price differential between dealers and "trainee-distributors."

G. Restricting wagon men to prescribed territories.

C.T.S. admits that each of the above contentions, standing alone, is not sufficient to establish an attempt to monopolize but contends that together they indicate such an intent.

There is no question that either Cornwell or C.T.S. had a right to terminate their oral agreement at any time either so desired, with or without cause. Refusal to accept return of tools was a hotly contested issue at trial, which issue the court has resolved in favor of Cornwell.

After taking over the Mac line and acquiring the Mac dealers, C.T.S. had a great many more dealers to whom to sell than it had during existence of the Cornwell-C.T.S.

agreement; whereas Cornwell, after July 29, 1964, was in the position of having a line of merchandise to sell and no distributor to whom to sell it. Cornwell therefore determined to establish a warehouse in California and to sell from the warehouse direct (thus eliminating a distributor-middleman) to wagon men. Cornwell solicited dealers for that purpose, including dealers who bought from C.T.S., trying to induce them to either remain or to become Cornwell dealers. Also certain employees of C.T.S. were solicited and subsequently were employed by Cornwell.

C.T.S. emphasizes that there was a price differential between Cornwell's own dealers. The evidence discloses that after Cornwell established its warehouse in California and began its own distributing system Cornwell had two classes of dealers—regular dealers and "trainee-dealers." A trainee-dealer was supposed to recruit new dealers, for which recruiting he obtained a larger discount than did one who acted solely in a dealer capacity.

C.T.S. now complains that in its new set-up Cornwell restricted wagon men to prescribed territories (which practice had been that of C.T.S. for many years). The evidence shows that all distributors attempted to restrict a dealer to a certain, prescribed territory but that some dealers arranged and agreed among themselves not to invade each others territory.*

When C.T.S. had adduced the foregoing facts, counsel made an offer of proof; based upon the offer of proof the court deemed further evidence cumulative and determined that at this stage of trial it would be feasible to hold in abeyance further C.T.S. presentation of its antitrust claim and proceed with Phase 4 of the trial format—Cornwell's allegations of C.T.S. antitrust violations.

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* A witness testified that some dealers in San Diego agreed not to invade each others territory.

PLAINTIFF'S CLAIM OF ANTITRUST VIOLATIONS

In its Reply to the C.T.S. counterclaims Cornwell alleged (page 3):

> "* * * defendant unlawfully conspired and attempted to monopolize for itself the distribution and sale of hand tools in the States of California and Nevada and attempted to foreclose plaintiff from making sales or gaining access to established dealers of such tools in such states. * * *."

Upon termination of the oral agreement with Cornwell, C.T.S. made inducement to dealers (who were then selling Cornwell products) to sell Mac merchandise. There was competition among the various distributors to recruit and to retain dealers; a dealer was, consequently, a very important cog in the sales process. Snap-On had its dealers, Mac had its dealers, and C.T.S. had its dealers who sold the Cornwell line.

The only evidence of violation of the Clayton Act, as alleged by plaintiff, was that defendant (C.T.S.) had attempted to acquire for itself a substantial portion of hand tool sales to dealers in California and Nevada and had attempted to foreclose plaintiff from making sales of hand tools to such dealers in those States.

If it was proper and legal for plaintiff to solicit dealers after July 29, 1964, it was also as proper and legal for defendant, C.T.S., to attempt to retain the dealers it already had. All distributors tried to persuade dealers to sell only those products handled by the distributors; and one of the reasons Cornwell and C.T.S. fell out was that C.T.S. was not requiring its dealers to sell only Cornwell products.

We find no more merit in plaintiff's claim of antitrust violation by C.T.S. than was found in defendants' allegations of antitrust violation by Cornwell.

Although counsel tied its claims of antitrust violation on "sale of tools," in reality the contest between plaintiff and defendant was directed to dealers. Cornwell alleged (REPLY of April 16, 1965, page 3):

> "* * *, defendant unlawfully conspired and attempted to monopolize for itself the distribution and sale of hand tools in the States of California and Nevada and attempted to foreclose plaintiff from making sales or gaining access to established dealers of such tools in such states."

C.T.S. alleged (Answer to Amended Complaint and Counterclaims filed March 26, 1965, page 11) that Cornwell

> "Established in California a wholly-owned distributorship servicing the states of California and Nevada in which states the sale and distribution of Cornwell products has been adequately developed by C.T.S. and the dealers doing business with C.T.S."

further alleging (page 12) that Cornwell

> "Solicited and is soliciting dealers doing business with C.T.S. for the purpose of inducing said dealers to buy directly from Cornwell;
>
> "Induced and is inducing dealers doing business with C.T.S. to purchase tools directly from Cornwell;
>
> "* * * *;
>
> "Solicited key employees of C.T.S. for the purpose of inducing said employees to terminate their employment with C.T.S. and to become dealers buying directly from Cornwell."

C.T.S. had a large number of trained dealers, as hereinbefore described, which it did not wish Cornwell to solicit when the Cornwell-C.T.S. relationship came to an end; hence C.T.S. raised the affirmative antitrust claims in its pleading.

The ultimate purpose of antitrust legislation is to insure competition in the selling of goods in or affecting interstate commerce. As said by Mr. Justice Black in *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. * * *, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.' Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition. * * *."

In *Standard Oil Co. v. United States,* 337 U.S. 293, Mr. Justice Frankfurter said (note 5):

> "* * * it is the preservation of competition which is at stake, * * *."

There is no question that there was, indeed, competition among the manufacturers, distributors, and dealers. It seems to this court that this is a case in which the antitrust laws are being resorted to in an attempt to restrict rather than to enlarge the field of competition.

During the trial of this segment of the case—Phase 4—objections were made by C.T.S. to certain questions propounded by Cornwell relative to alleged antitrust violations, and Cornwell made numerous offers of proof. At the conclusion of the Cornwell testimony the court requested that counsel state the offers of proof. Based upon plaintiff's allegations as to antitrust violations by defendant, the evidence adduced, and the offers of proof, the court is of the opinion that Cornwell did not establish antitrust violation by C.T.S.

C.T.S. moved for a directed verdict relative to the Cornwell claim of antitrust violation.

During presentation of Phase 3 of the trial format—C.T.S. claims of antitrust violations by Cornwell—Cornwell had objected to numerous questions propounded by C.T.S. and to numerous exhibits offered in evidence by C.T.S. Upon the sustaining of Cornwell's objections, C.T.S. then made offers of proof; as hereinbefore mentioned (page 14, lines 3-10) the motions were continued to a future time in the proceedings, as the court did not wish at that stage of the trial to excuse the jury to hear the numerous offers of proof; but at the conclusion of Cornwell's antitrust presentation, the court then requested C.T.S. to make its offers of proof.

Inasmuch as the offers of proof presented by C.T.S. were nothing more than cumulation of testimony to bolster facts already in evidence, the court came to the conclusion that, considering the allegations of the C.T.S. counterclaims, interrogatories, admissions made during pretrial, and the offers of proof, C.T.S. had failed to sustain its burden of proof to establish antitrust violation by Cornwell.

The Jury

When the jury was impaneled in this case two alternate jurors were selected. During trial two jurors were excused because of illness which prevented their attendance. During argument of counsel on the motions for directed verdicts, the court was informed that another juror had been hospitalized and could not further attend trial. Counsel declined to continue with the eleven remaining jurors, pursuant to the provisions of Rule 48, Federal Rules of Civil Procedure.

Motions For Directed Verdicts

Motions for directed verdicts having been properly and timely made by each counsel, said motions were disposed of as follows:

1. In favor of Cornwell on the open book account, in the sum of $12,110.72, together with interest thereon;

2. In favor of Cornwell on the issue of tools to be returned;

3. In favor of Cornwell as to the C.T.S. claim of antitrust violation;

4. In favor of C.T.S. as to the Cornwell claim of antitrust violation.

Pursuant to the court's rulings on the motions for directed verdicts there were three, separate judgments on the aspects of the case presented to the court for signature. Inasmuch as some complaint has been made as to the judgments presented, signed and filed, to clarify the judgments and to correct inadvertent error and clerical mistake in the judgments heretofore filed, the court will sign and order filed and entered one, consolidated Judgment which shall supersede and take the place of each and all the individual judgments heretofore entered in this case.

Dated this 13th day of June, 1969.

Harry C. Westover,
United States Senior District Judge.

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October Term, 1971
No. 71-697

CORNWELL QUALITY TOOLS CO.,
Cross-Petitioner,

vs.

C.T.S. COMPANY, INC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION.

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CORNWELL QUALITY TOOLS CO.,

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BRIEF OF RESPONDENT IN OPPOSITION.

Jurisdiction.

This Court does not now have jurisdiction to grant Cornwell's "Conditional Cross-Petition for Writ of Certiorari" because it was not timely filed.

Under 28 U.S.C. § 2101, a writ of certiorari "intended to bring a judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree". In the instant case, the judgment of the United States Court of Appeals in Cornwell's appeal, No. 24914, was entered on June 25, 1971. Hence the 90 day period provided by 28 U.S.C. § 2101 expired on September 23, 1971, approximately two months before the filing of Cornwell's conditional petition for a writ of certiorari.

While the filing by Cornwell of a petition for rehearing and/or the post entry modification of a judg-

ment could have operated to extend the time for petitioner's seeking a writ of certiorari, no such events have occurred in the instant case. With respect to the former method of extending time, a petition for rehearing does not operate to extend the time for filing a writ of certiorari except as to judgments which might be modified as the result of the granting of the petition. As stated in *Department of Banking v. Pink,* 317 U.S. 264, 266 (1942), the filing of a petition for rehearing extends the time to apply for a writ of certiorari "because it operates to suspend the finality of the . . . court's judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties". See also *United States v. Healy,* 376 U.S. 75, 77-80 (1964); *Foreman v. United States,* 361 U.S. 416, 426 (1960); *Pfister v. Northern Illinois Finance Corporation,* 317 U.S. 144, 149-150 (1942); Stern & Gressman, *Supreme Court Practice,* pp. 248-249, 4th ed. (1969).

Cornwell did not petition for rehearing in the Court of Appeals.[1] Indeed, Cornwell has sought no stay of mandate in connection with its appeal, the judgment of the Court of Appeals has been received by the District Court, and the hearing on the filing and spreading of

[1]On July 8, 1971, Cornwell filed a motion in the Court of Appeals to extend the time for the filing of a petition for rehearing. The affidavit of counsel for Cornwell in support of the motion stated that although he believed there were grounds upon which a rehearing could be sought, he was "uncertain as to whether the client [Cornwell] would desire such rehearing against the possibility of obtaining the same in view of the expense that would be involved therein". In fact, a petition for rehearing was never filed by Cornwell, and the docket entries of the Court of Appeals reflect advice by Cornwell's counsel to the court that Cornwell "will not file petition" and further that the "motion [for extension of time to file the petition for rehearing] is now moot".

judgment in Cornwell's appeal is presently scheduled for January 12, 1972. Although CTS did file a petition for rehearing in appeal No. 24969 (No. 71-608) in which CTS was appellant and Cornwell was appellee, the granting of that petition, if it had occurred, would not have had the effect of modifying the rights of the parties with respect to the judgment for which certiorari is here sought.

The appeal in which CTS filed its petition for rehearing, No. 24969, was a different appeal from that in which Cornwell now seeks certiorari, No. 24914. While the two appeals were consolidated for purposes of briefing and argument and the Court of Appeals handed down a single opinion covering both, the docket numbers were different, the issues presented by each were independent of those presented by the other, and the Court of Appeals rendered separate judgments in each. Moreover, the CTS petition for rehearing was directed solely to matters embraced within the judgment in No. 24969; nothing in the No. 24914 judgment was within its ambit.

So far as modification of a judgment is concerned, a modification does not operate to extend the time for filing for certiorari unless it "changes matters of substance, or resolves a genuine ambiguity in a judgment previously rendered". *Federal Power Commission v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 211 (1952). No such modification occurred here.

Accordingly, this Court is without jurisdiction to consider the conditional cross-petition. We proceed, however, to show that the petition is unmeritorious.

Statement of the Case.

At trial, petitioner Cornwell, in response to CTS's antitrust claims, filed its own antitrust claims alleging that CTS conspired and attempted to monopolize in violation of Section 2 of the Sherman Act.[2] During the course of the pre-trial proceedings, Cornwell continually emphasized that its antitrust claim was a "defensive measure" designed to counter CTS's claims and that counsel had "no confidence" in Cornwell's claim [C.T. 1632-1656]. CTS, prior to trial, made a motion to dismiss Cornwell's claims under Rules 11 and 41b F.R.C.P. as sham [C.T. 1632-1656]. The trial court stated that it would grant the motion; counsel for Cornwell then made a plea to the court and suggested that his good faith as an attorney was being called into question, whereupon the court reversed itself and denied the motion [R.T. of Proceedings of May 6, 1968, pp. 4-12; C.T. 517]. Such was the background leading up to the trial.

Taken in the light most favorable to Cornwell, the evidence introduced or offered was as follows: CTS was not complying with Cornwell's wishes that it buy all of its merchandise from Cornwell including that merchandise as to which Cornwell merely purchased and resold to its distributors. Because of this, and for other reasons having to do with Cornwell's desire to enter the California market, CTS was terminated by Cornwell on May 19, 1964 as a distributor. CTS was then probationally reinstated after having pledged

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[2]During the course of discovery, Cornwell, in response to interrogatories, expressly qualified its allegation of conspiracy "to state that it is uncertain whether the competitor [Mac Tools] referred to [in the allegations] entered into any agreement with the defendant to foreclose plaintiff from making sales of hand tools to dealers in California and Nevada" [R.T. 2042-2045].

to Cornwell that it would seek to accommodate its operations to Cornwell's desires. It was at that time that CTS, being less than fully confident in Cornwell's continued good faith, sought an alternative source of supply and commenced negotiating with Mac Tools. It was CTS's intention to try to obtain a Mac distributorship with a view toward having a full line of professional mechanic's hand tools available to it in the event it was again terminated by Cornwell and to have two lines available in the event it was not. CTS talked to certain of its dealer customers about their receptivity to the Mac line during the period which intervened between May 19 and July 29, at which time CTS was again terminated by Cornwell.

No evidence was offered or received that any discussions or negotiations took place between CTS and Mac Tools which involved in any way either the termination of the relationship between CTS and Cornwell or the exclusion of Cornwell from the marketplace. No evidence was offered, and Cornwell did not contend at trial or in the Court of Appeals, that CTS terminated the relationship; all the evidence was to the contrary, *i.e.* that it was Cornwell which brought the distributorship to an end when it learned that CTS was interested in taking on the Mac line.

At trial, the situation that pertained to the presentation of Cornwell's case was very different from the circumstances under which CTS tried its case (which is the subject of the petition in No. 71-608). Cornwell did not make its offers of proof with regard to its antitrust claims in a summary form and it was afforded an opportunity to present by direct evidence from the witnesses, or by offering specific portions of depositions

on which it relied.[3] No evidence of any predatory acts or practices was alleged or offered by Cornwell. It was a total failure of proof on which the trial court directed verdicts against Cornwell on its antitrust claims.[4] In the Court of Appeals, Cornwell was also unable to point to the evidence of conspiracy or from which facts or inferences of a specific intent to injure Cornwell could be drawn.

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[3]Accordingly, Cornwell should be able to point out with particularity as to the precise evidence it relies upon to show either a conspiracy of any form aimed at Cornwell or an intention to injure Cornwell; its inability to do so flows from a failure of facts, not procedure.

[4]Two of the three exhibits here cited by Cornwell (on pages 4 and 5 of its Conditional Cross-Petition) as establishing that it proved its case were not even offered in evidence. As to Exhibit 19, a three volume deposition, Cornwell's counsel stated ". . . I withdraw my request that they be admitted into evidence to the jury" [R.T. 2202-2203]. Exhibit 38, another three volume deposition, was one which counsel claimed "that they themselves are cumulative"; they were not offered in evidence [R.T. 2480-2482].

ARGUMENT.

Petitioner here adopts the same strategy it sought to use in the trial court and in the Court of Appeals, namely to use claimed violations of the antitrust laws by CTS as a means to cloud the issues relating to CTS's claims. That is apparently the reason that Cornwell makes the cross petition for certiorari "conditional". Cornwell's claims could properly have been decided adversely to Cornwell at both the trial and the appeal court on the other offered facts without resort to the question of whether the requisite "specific intent" had been proved. Cornwell, in its conditional cross petition, cites to three exhibits (depositions) to support its claim that it established certain facts which were allegedly sufficient. It fails to note, however, that as to much of such evidence, it was either not offered or an independent evidentiary reason for excluding it existed.

Cornwell did not contend that CTS cut off Cornwell and the fact is that Cornwell cut off CTS twice in 1964 [R.T. 726, 2564-2565, 805-810; C.T. 1432-1433, 144]. Cornwell does not set forth any evidence or offer evidence which would establish that CTS and Mac Tools discussed CTS ceasing to do business with Cornwell or tying up all the dealers as part of its taking on the Mac line [R.T. 2104-2128, 2233-2235]. There was no offered evidence from which any exclusionary or predatory intent on the part of CTS could be shown or inferred. The evidence was that CTS turned to Mac Tools after having been momentarily cut off by Cornwell and when it feared being cut off again. CTS hoped to assure itself of one dealer line and felt that if Cornwell chose not to cut it off again, it would have two lines. The latter eventuality never

arose because Cornwell again terminated CTS on July 29, 1964.

At trial, Cornwell proceeded upon two factually inconsistent theories:

(a) That in June or July 1964 CTS entered into an agreement with a prospective supplier and principal competitor of Cornwell, namely Mac Tools, wherein it was agreed that CTS would cease doing business with Cornwell and instead carry the Mac line and arrange the switch in a manner which would result in CTS keeping and obtaining as many dealers as it could. There is no authority which Cornwell can cite suggesting that such conduct, if it had happened, would be illegal and the law is to the contrary. See *Amplex of Maryland, Inc. v. Outboard Marine Corporation,* 380 F.2d 112 (4th Cir. 1967), cert. den. 389 U.S. 1036 (1968); *Walker Dist. Co. v. Lucky Lager Brewing Co.,* 323 F.2d 1 (9th Cir. 1963); *Packard Motor Car Co. v. Webster Motor Car Co.,* 243 F.2d 418 (D. C. Cir. 1957), cert. den. 355 U. S. 822 (1957); *Schwing Motor Co. v. Hudson Sales Corp.,* 138 F. Supp. 899 (U.S.D.C. Md. 1956), aff'd *per curiam* 239 F.2d 176 (4th Cir. 1956), cert. den. 355 U.S. 823 (1957). There is little law relating to a seller cutting off a supplier since the shoe is usually on the other foot.

Alternatively, Cornwell argued:

(b) CTS (a non-manufacturing seller) entered into an agreement with Mac Tools to obtain the exclusive right to sell the Mac line while intending at the same time to keep the Cornwell line with a view toward maximizing its control of the dealer business. Since Cornwell argued that Snap-On Tools was by far the dominant company in the business, what could be

wrong with a wholesale distributor carrying two competitive lines even if there were two lines out of three. No authority is cited for the proposition that such conduct would be illegal. Since the record fails to establish that either (a) or (b), *supra,* happened, the issue is academic. One searches the record in vain for any concerted or unilateral exclusionary plan.

The record below revealed only that Cornwell complained because CTS refused to play into its hands and had the Mac Tools line arranged in advance of its being cut off; the subsequent competitive scramble for the dealers' business was the result of the termination of the relationship between the parties. When one strips away from Cornwell's contentions words like "conspiracy" and "foreclose" and "monopolize" and looks at the facts presented, Cornwell's case stands denuded. It is now what it was originally—an effort to cloud the issues so as to preclude CTS from obtaining a merits judgment on its antitrust case. Petitioner's case was a fact case on which it failed; it provides no basis for granting a writ of certiorari.

Conclusion.

The Conditional Cross-Petition for Writ of Certiorari should be denied.

Dated: December 23, 1971.

Respectfully submitted,

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